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Katherine Shaw Spaht

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MATRIMONIAL REGIMES

Katherine Shaw Spaht*

LEGISLATION**

* Professor of Law, Louisiana State University.

** At the 1981 session of the legislature, five significant pieces of legislation affecting matrimonial regimes law were passed, but only two acts are discussed in this symposium. The addition of Civil Code article 2369.1 by Act 751, authorizing the judge to partition in kind community property at termination by allocating assets and liabilities of "equal net value," is discussed in the student symposium on matrimonial regimes which appears in this issue at pages 725-820. Senate Concurrent Resolution No. 165 requests the Senate Committee on Judiciary A and the House Committee on Civil Law and Procedure to function as a joint committee. The joint committee resolution proposes a study of the "need for and feasibility of developing a specific procedure for the partition of community property between spouses, and settlement of debts and claims for reimbursement upon dissolution of the community regime for any cause." *Id.* The joint committee is charged to make a written report of its findings to the legislature prior to the 1982 Regular Session, "together with any specific proposals for legislation." *Id.* Thus, future legislation likely will be proposed to resolve remaining problems which exist when the community is terminated. Termination of the community under the matrimonial regimes law is the subject of one of the articles in the student symposium in this issue, see Note, *Termination of the Community*, 42 LA. L. REV. at pages 789-820 and in a student comment to be published here in the future.

Article 2343, involving the transformation of community property to separate property of the donee spouse, was amended by Act 921. In addition to classifying the property as separate, the article classifies the natural and civil fruits, shut-in payments, bonuses, and delay rentals produced from this property as separate property of the donee, without the necessity of the donee's declaration reserving such proceeds as separate. Civil Code article 2339, which generally classifies fruits and income produced from separate property as community, was amended approximately six months after it became effective. 1980 La. Acts, No. 565, § 2. The original enumeration of payments "arising from mineral leases" under article 2339 did not include royalties or the payment of the minerals "in kind" as the equivalent of fruits. By amendment during the 1980 legislative session royalties were added to the enumeration in article 2339, as well as the following language: "minerals produced from or attributable to a separate asset. . . ." *Id.* Thus, from September 12, 1980, royalties and "in kind" minerals produced from a separate asset were classified as community, unless the spouse whose separate property was affected filed a declaration reserving the payments as separate. The classification of royalties and "in kind" mineral payments attributable to separate property from January 1, 1980, until September 12, 1980, were separate property without the necessity of the article 2339 declaration. See a full discussion of this subject in Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 110-13 (1979). At the time that article 2339 was amended to include royalties and "in kind" payments of minerals, article 2343, the exception to the general rule of article 2339, was overlooked. Arguably, from September 12, 1980 until September 13, 1981, if royalties or "in kind" minerals were produced from separate property of a spouse under article 2343, those payments were

Voluntary Partition—Civil Code Articles 2336 and 2341

With one notable exception,¹ spouses are generally capable of contracting with each other by virtue of an amendment to Louisiana Civil Code article 1790² effective January 1, 1980. Thus, spouses are free to enter into sales, leases, partnerships—virtually any contract that could be executed with a stranger. The only exception to the spouses' general capacity to contract with each other is the matrimonial agreement which requires judicial approval.³

Because the spouses must have judicial approval of a matrimonial agreement, a distinction between an agreement

community under article 2339 unless a declaration reserving them as separate was filed. The general rule of article 2339 applied to those payments, because the exception of article 2343 included only the enumerated "bonuses, delay rentals and shut-in payments arising from mineral leases." As of September 13, 1981, however, article 2343 includes in its enumeration, just as article 2339, "royalties" and "minerals produced from or attributed to the property given."

Another piece of significant 1981 legislation was an amendment to Louisiana Civil Code article 2348, authorizing a spouse to renounce the right to concur in the alienation, encumbrance or lease of a community immovable. 1981 La. Acts, No. 132, § 1. Before the 1981 amendment, the renunciation had to be as to a particular piece of community immovable property, evidenced by the use of the article "a" in the statutory language and comment (b) to Civil Code article 2348. Under article 2348, as amended, a spouse may renounce the right to concur in the alienation, encumbrance or lease of "some or all of the community immovables." *Id.* (emphasis added). In instances where a spouse does generally renounce the right to concur in the sale of all community immovables, article 2348 permits the spouse to "reserve the right to concur in the alienation, encumbrance, or lease of specifically described community immovable property." Amended article 2348 allows a spouse to renounce the right to concur generally, which is similar in effect to the ability of the wife *generally* to waive the necessity of her consent to the sale, mortgage or lease of community immovable property under Civil Code article 2334 (effective January 1, 1977; repealed January 1, 1980).

1. LA. CIV. CODE art. 2329 (effective January 1, 1980).

2. LA. CIV. CODE art. 1790 (effective January 1, 1980):

Besides the general incapacity that persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contracts, such as purchases, by the administrator, of any part of the estate committed to his charge. These take place only in the cases specially provided by law, under different titles of this code.

3. LA. CIV. CODE art. 2329 (effective January 1, 1980):

Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.

Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.

During the first year after moving into and acquiring a domicile in this state, spouses may enter into a matrimonial agreement without court approval.

"establishing a regime of separation of property or modifying or terminating the legal regime"⁴ and a contract which has the effect of changing the classification of property is important. For example, the spouses may desire to convert community property to separate property of one of the spouses. A comment to article 2330 suggests that such a provision could be included in a matrimonial agreement, since the spouses have flexibility in determining the ownership of their property subject to certain limitations.⁵ Despite the implications that a change in the characterization of community property to separate property is "modifying the legal regime," article 2343 permits this transfer by simple donation.⁶

Husband and wife are capable of executing a contract of partition,⁷ just as they have the capacity to execute other ordinary contracts. Although Civil Code article 2336 prohibits a judicial partition of community property during the existence of a legal regime,⁸ a comment to article 2336 recognized the ability of spouses who each own an undivided one-half interest in community property to partition amicably the things of the community.⁹ The resulting classifica-

4. LA. CIV. CODE art. 2328 (effective January 1, 1980):

A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime. Spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law. The provisions of the legal regime that have not been excluded or modified by agreement retain their force and effect.

5. LA. CIV. CODE art. 2330 comment (d) (effective January 1, 1980):

Article 2330 allows the spouses flexibility to determine the ownership and management of their property subject to certain limitations. For example, the spouses may by matrimonial agreement provide for contribution to the expenses of the marriage, for apportionment of community property according to fixed shares, or for the reservation of fruits as separate property. The spouses may, further, determine that their existing or future property shall be subject to the matrimonial regime. In such a case, a matrimonial agreement may in fact be a donation governed by the rules of substance and form applicable to donations.

6. LA. CIV. CODE art. 2343 (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1):

The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property and the natural and civil fruits of the thing, and minerals produced from or attributed to the property given as well as bonuses, delay rentals, royalties and shut-in payments arising from mineral leases, form part of the donee's separate property.

7. LA. CIV. CODE art. 1790 (effective January 1, 1980).

8. LA. CIV. CODE art. 2336 (effective January 1, 1980):

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.

9. LA. CIV. CODE art. 2336, comment (a) (effective January 1, 1980):

The co-ownership of the community is subject to the rules governing termina-

tion of the property acquired by voluntary partition of community property was community under Civil Code article 2338: "all other property not classified by law as separate property."¹⁰ The omnibus clause of article 2338 classifying the property acquired by partition as community" frequently deprived the spouses of the ability to accomplish what they desired by the partition. Therefore, amendments to Louisiana Civil Code articles 2336 and 2341 were recommended by the Louisiana Law Institute and passed at the 1981 legislative

tion of the regime rather than the general rules of the Civil Code governing judicial partition. The spouses may amicably partition things of the community, without prejudice to the rights of third persons. But neither the spouses nor their creditors may force a judicial partition as long as the regime continues to exist.

10. LA. CIV. CODE art. 2338 (effective January 1, 1980), the text of which is reproduced at note 114, *infra*.

11. Property acquired by virtue of a voluntary partition was not classified as separate property of a spouse under the following pertinent articles.

LA. CIV. CODE art. 2341 (effective January 1, 1980), the amended version of which appears at note 115, *infra*.

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; and damages or other indemnity awarded to a spouse in connection with the management of his separate property.

LA. CIV. CODE art. 2342 (effective January 1, 1980):

A declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse may be controverted by the other spouse unless he concurred in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse. . . .

LA. CIV. CODE art. 2343 (effective January 1, 1980):

The donation by a spouse to the other spouse of his undivided interest in a thing forming part of the community transforms that interest into separate property of the donee. Unless otherwise provided in the act of donation, an equal interest of the donee is also transformed into separate property and the natural and civil fruits of the thing, and minerals produced from or attributed to the property given as well as bonuses, delay rentals, royalties and shut-in payments arising from mineral leases, form part of the donee's separate property.

LA. CIV. CODE art. 2344 (effective January 1, 1980):

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.

Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse.

session. The amendment to article 2336 adds a new paragraph: "During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are his separate property."¹² Likewise, article 2341 which contains an enumeration of property that is separate was amended to add the following language: "things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime."¹³ By these legislative provisions spouses have the recognized capacity to partition voluntarily *without court approval* community property *in whole or in part* with the result that each spouse's acquisitions are his separate property. The significance of the statutory language "without court approval" is the legislature's distinction between the proper subject of an ordinary contract of the spouses and that of a matrimonial agreement. Even without the language exempting the voluntary partition from judicial approval, the partition of the *whole* community would not necessarily terminate the legal regime.¹⁴ Property acquired after the voluntary partition would continue to be subject to the system of principles and rules provided by the spouses¹⁵ or by law.¹⁶ Arguably, the language was unnecessary; therefore its inclusion in article 2336 is capable of two possible explanations. First, it may be considered merely as a clarification—a voluntary partition is an ordinary contract, not a matrimonial agreement. Or, the implication may be that without specific dispensation a contract between the spouses which reclassifies property as separate or community is subject to the requirement of court approval, as it is a matrimonial agreement.¹⁷

Article 2336 does not specify any formal requirements for a voluntary partition of the community. Thus, the general rules regulating the formality and recordation requirements for conventional obligations would apply. For example, a partition affecting community immovable property would have to be in writing¹⁸ and recorded to affect third persons.¹⁹ If the transaction designated a

12. LA. CIV. CODE art. 2336 (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1).

13. LA. CIV. CODE art. 2341 (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1).

14. See LA. CIV. CODE art. 2328 (effective January 1, 1980).

15. LA. CIV. CODE arts. 2328 & 2329 (effective January 1, 1980).

16. Chapter 2 of Title VI of Book III of the Louisiana Civil Code (effective January 1, 1980).

17. See LA. CIV. CODE art. 2329 (effective January 1, 1980).

18. LA. CIV. CODE art. 2275.

19. LA. CIV. CODE arts. 2265 & 2266.

partition by the spouses is in fact a partition, authentic form is not required, as it is neither a donation²⁰ nor a matrimonial agreement.²¹ Forced heirs of either spouse adversely affected by the voluntary partition would only have the relief of an action in declaration of simulation.²² For, if the contract is a partition, it is not a donation subject to an action in reduction if it exceeds the disposable portion.²³ Likewise, creditors have the protection of the action in declaration of simulation²⁴ or the revocatory action.²⁵

Transformation of Separate Property to Community Property

Despite the internal inconsistency of the comment,²⁶ Civil Code article 2343.1 is an entirely new provision.²⁷ Before the enactment of article 2343.1, a spouse had to execute a matrimonial agreement in order to convert separate property to community property.²⁸ Without a matrimonial agreement, the donation by a spouse of an undivided one-half interest in his separate property to the other spouse did not transform the property from the separate property of the donor to community property. The only result the spouse could accomplish by the donation was that each spouse would own thereafter an undivided one-half interest as separate property.²⁹ In contrast to the matrimonial regimes law of Louisiana, some of the other community property states permit husband and wife to transform separate property to community³⁰ and community property

20. LA. CIV. CODE art. 1536.

21. LA. CIV. CODE art. 2331 (effective January 1, 1980).

22. LA. CIV. CODE art. 2239.

23. See LA. CIV. CODE art. 1502.

24. LA. CIV. CODE art. 2239.

25. LA. CIV. CODE arts. 1969-1994.

26. LA. CIV. CODE art. 2343.1, comment (a), *added by* 1981 La. Acts, No. 921, § 1: "This provision is new. It clarifies the law." The designated source of the article is "New."

27. LA. CIV. CODE art. 2343.1, comment (a), *added by* 1981 La. Acts, No. 921, § 1:

The transfer by a spouse to the other spouse of a thing forming part of his separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act.

28. See LA. CIV. CODE arts. 2328, 2329, 2330 & 2330 comment (d) (effective January 1, 1980).

29. The undivided one-half interest of the donor naturally retained its separate character. The undivided one-half interest donated to the other spouse was classified as the separate property of the donee. LA. CIV. CODE art. 2341 (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1).

30. *Arizona*: see, e.g., *Baldwin v. Baldwin*, 50 Ariz. 265, 71 P.2d 791 (1937); *Moser v. Moser*, 572 P.2d 446 (1977); *Schock v. Schock*, 11 Ariz. App. 53, (1969).

California: see CALIF. CIVIL CODE § 5103 (West 1970); *Hotle v. Miller*, 51 Cal. 2d 541,

to separate property of one of the spouses³¹ without restriction. Therefore, on recommendation of the Louisiana Law Institute a new article was added to the matrimonial regimes legislation to permit a spouse to convey to the other spouse a thing that forms part of the transferor's separate property, with the stipulation that the thing transferred shall become part of the community.

As described in the comments to Civil Code article 2343.1, "the transferor conveys to the other spouse one-half of what he owns and retains the other half as co-owner under the regime of acquets and gains."³² The transfer may be either gratuitous or onerous. In contrast, Civil Code article 2343 permits a transformation of community property to separate property of a spouse only gratuitously.³³ Whether the transformation is onerous or gratuitous, the transfer *must* include the stipulation that it shall be part of the community. Under article 2343.1, special rules of form apply to the transformation of separate property to community property. As to movable property, if the transfer is onerous it must be in writing, which is a departure from the general rules of conventional obligations;³⁴ and if the transfer of movable property is by gratuitous title, it must be by authentic act, which as applied to corporeal movable property is an exception to the general rule.³⁵ If the transfer affects immovable property, a transfer by onerous title must be in writing, and a transfer by gratuitous title must be by authentic act.

334 P.2d 849 (1959); *Kenney v. Kenney*, 220 Cal. 134, 30 P.2d 398 (1934); *Frymire v. Brown*, 94 P.2d 334 (Cal. App. 3d Cir. 1949).

Texas: see *Tittle v. Tittle*, 148 Tex. 202, 220 S.W. 2d 637 (1949); *Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902); *Coggin v. Coggin*, 204 S.W. 2d 47 (Tex. Civ. App. 1947).

Washington: see, e.g., *Volz v. Zang*, 113 Wash. 378, 194 P. 409 (1920); *In re Estate of Verbeek*, 2 Wash. App. 144, 467 P.2d 178 (1970).

31. Louisiana's equivalent provision is LA. CIV. CODE art. 2343 (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1), the text of which is reproduced at note 6, *supra*.

32. LA. CIV. CODE art. 2343.1, comment (b), *added by* 1981 La. Acts, No. 921, § 1.

33. LA. CIV. CODE art. 2343 (effective January 1, 1980, *as amended by* 1981 La. Acts, No. 921, § 1). To convert community property to separate property, a spouse is authorized only to transfer his undivided one-half interest *gratuitously*. Thus, article 2343 is consistent with the general article enumerating property that comprises a spouse's separate property. LA. CIV. CODE art. 2341, *as amended by* 1981 La. Acts, No. 921, § 1. Should a spouse dispose of his one-half interest in the community *onerously* to the other spouse it would be community property, with one exception, under the clause of article 2338: "all other property not classified by law as separate property." However, if the spouse purchasing the undivided one-half interest of the other is able to prove separate funds were used (LA. CIV. CODE art. 2341), the presumption that the property is community is rebutted. LA. CIV. CODE art. 2340. In the latter case, the undivided one-half interest purchased is separate property but the remaining one-half interest is community property.

34. LA. CIV. CODE arts. 1762 & 1764.

35. LA. CIV. CODE art. 1539.

The ability accorded to husband and wife to transform separate property to community property is particularly significant in light of the 1981 changes in successions law. For example, under Louisiana Civil Code article 890,³⁶ the surviving spouse shall have a legal usufruct over the deceased spouse's one-half interest in the community undisposed of by testament and inherited by descendants. In contrast to its predecessor, Louisiana Civil Code article 916,³⁷ article 890 extends the legal usufruct of the surviving spouse "to all former community property of the deceased regardless of whether the descendants who succeed to the property are issue of the marriage with the survivor or not."³⁸ If non-issue of the marriage are the heirs of the deceased, security may be requested by the naked owners from the surviving spouse.³⁹ Of particular importance is the fact that

36. LA. CIV. CODE art. 890, *as amended by* 1981 La. Acts, No. 919, § 1:

If the deceased spouse is survived by descendants, and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period.

The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over so much of the separate property as may be inherited by issue of the marriage with the survivor or as may be inherited by illegitimate children.

A usufruct authorized by this article is to be treated as a legal usufruct and is not an impingement upon legitime.

If the usufruct authorized by this article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse, or affects separate property, security may be requested by the naked owner.

This article, under section 7 of 1981 La. Acts, No. 919, § 1, shall apply "to the rights and obligations of persons whose date of death is after December 31, 1981."

37. LA. CIV. CODE art. 916:

In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage unless the usufruct has been confirmed for life or any other designated period to the survivor by the last will and testament of the predeceased husband or wife, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct shall not be an impingement upon the legitime. Further, a husband or wife may, by his or her last will and testament, grant a usufruct for life or any other designated period to the surviving spouse over so much of the separate property as may be inherited by issue of the marriage with the survivor, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct thus granted shall be treated in the same fashion as a legal usufruct and not be an impingement upon the legitime.

38. LA. CIV. CODE art. 890, comment (a), *as amended by* 1981 La. Acts, No. 919, § 1.

39. LA. CIV. CODE art. 890, comment (b), *as amended by* 1981 La. Acts, No. 919, §

1. See also LA. CODE CIV. P. art. 3154.1, *added by* 1981 La. Acts, No. 919, § 3.

article 890 characterizes this usufruct as a legal usufruct, which is not to be considered an impingement on the legitime of forced heirs. Thus, by simply converting, onerously or gratuitously, separate property to community property, a spouse is assured that the survivor will enjoy a usufruct over the deceased's share of the property, regardless of who inherits it, and will not be subject to an action in reduction by forced heirs.⁴⁰ Should a spouse die without being survived by children, the surviving spouse succeeds to his share of the community property⁴¹ in preference to the deceased's parents and siblings. Yet, if the property left by the deceased is separate property, father and mother, and brothers and sisters or their descendants succeed to the separate property of the deceased,⁴² in preference to the surviving spouse.⁴³ Without the necessity of executing a will, a

40. See LA. CIV. CODE art. 1502.

41. LA. CIV. CODE art. 889, as amended by 1981 La. Acts, No. 919, § 1: "If the deceased spouse leaves no descendants, his surviving spouse succeeds to his share of the community property." Cf. LA. CIV. CODE art. 915:

When either husband or wife shall die, leaving neither a father nor mother nor legitimate descendants, and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave legitimate descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law.

Should the deceased leave no legitimate descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse, who, together with the father or mother inheriting in the absence of legitimate descendants, as provided above, shall inherit as legal heir by operation of law, and without the necessity of compliance with the forms of law provided in this Chapter for the placing of irregular heirs in possession of the succession to which they are called.

42. LA. CIV. CODE art. 891, as amended by 1981 La. Acts, No. 919, § 1:

If the deceased leaves no descendants but is survived by a father, mother, or both and by a brother or sister, or both, or descendants from them, the brothers and sisters or their descendants succeed to the separate property of the deceased subject to a usufruct in favor of the surviving parent or parents. If both parents survive the deceased, the usufruct shall be joint and successive. A parent, for purposes of this and the following article, includes one who is legitimately filiated to the deceased or who is filiated by legitimation or by acknowledgement under Article 203 or by judgment under Article 209 or who has openly and notoriously treated the child as his own and has not refused to support him.

LA. CIV. CODE art. 892, as amended by 1981 La. Acts, No. 919, § 1:

If the deceased leaves neither descendants nor parents, his brothers or sisters or descendants from them succeed to his separate property in full ownership to the exclusion of other ascendants and other collaterals.

If the deceased leaves neither descendants nor brothers or sisters, nor descendants from them, his parent or parents succeed to the separate property to the exclusion of other ascendants and other collaterals.

43. LA. CIV. CODE art. 894, as amended by 1981 La. Acts, No. 919, § 1:

If the deceased leaves neither descendants, nor parents, nor brothers, sisters or

spouse by transformation of separate property to community may prefer the surviving spouse over parents, brothers and sisters, and be assured that the usufruct of his undivided one-half share shall apply to all descendants, whether issue or non-issue of the marriage, and not be subject to an action in reduction.

JURISPRUDENCE***

Classification of Pensions

Although two Louisiana courts of appeal considered the classification of a spouse's military retirement plan and reached con-

descendants from them, his spouse not judicially separated from him shall succeed to his separate property to the exclusion of other ascendants and other collaterals.

***The United States Supreme Court decision in *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S. Ct. 1195 (1981) is not discussed in the text of this symposium, because its major significance concerns retroactive application. The Fifth Circuit Court of Appeal held that Louisiana's "head and master" provision, LA. CIV. CODE art. 2404 (repealed January 1, 1980), was unconstitutional under the Equal Protection Clause of the fourteenth amendment to the United States Constitution. 609 F.2d 727 (5th Cir. 1979). Despite ruling that Civil Code article 2404 was unconstitutional, the Fifth Circuit concluded, "We apply our decision today prospectively only, because a holding of retroactive invalidity of Article 2404 would create a substantial hardship with respect to property rights and obligations. . . . Since our decision could produce substantial inequitable results if applied retroactively, we avoid that 'injustice or hardship' through a holding of nonretroactivity." 609 F.2d at 735-36.

In affirming the court of appeal decision the majority of the United States Supreme Court refused to address the issue of retroactivity since it was not properly before the Court: "We decline to address appellant's concerns about the potential impact of the Court of Appeal's decision on other mortgages executed pursuant to Art. 2404. The only question properly before us is whether the decision of the Court of Appeals applies to the mortgage in this case, and in that issue we find no ambiguity." 450 U.S. at 462, 101 S. Ct. at 1200. The Supreme Court concluded that the mortgage executed by the husband in 1974 was invalid. However, concurring Justices Rehnquist and Stewart did address the issue of retroactivity: "While it is clear that the Court is correct that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that the court's explicit announcement that its holding was to apply only prospectively means that no other mortgage executed before the date of the decision of the Court of Appeals is invalid by reason of its decision." 450 U.S. at 463, 101 S. Ct. at 1200 (Stewart, J., concurring).

Should the concurring Justices be correct, the date that the court of appeal decision was rendered was December 12, 1979. The appropriate federal statute, 28 U.S.C. 2101 (1976), and the Federal Rules of Appellate Procedure, No. 41 provide for a suspension of the mandate issued to the district court when the losing party applies for a writ of certiorari. There is no specific reference to a stay of the mandate (which issues twenty-one days after entry of a notation of the judgment in the docket) when a losing party appeals the judgment. Possibly, therefore, under the concurring opinion, sales, mortgages or leases executed by the husband alone, when the title to immovable property stood in his name alone and was not declared to be the family home, were invalid from December 12, 1979 to January 1, 1980. See LA. CIV. CODE arts. 2334 & 2404 (as they

flicting results," the United States Supreme Court in *McCarty v. McCarty*⁴⁵ held that the husband's army retirement pay was separate property. The husband argued that the application of community property concepts to military retired pay conflicted with federal law for two reasons: (1) military retired pay is not deferred compensation for services performed during marriage, but is current compensation for reduced but currently rendered services,⁴⁶ and (2) the application of community property law "conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation."⁴⁷ Deciding on the basis of the husband's second argument,⁴⁸ the Court examined the legislative history of the military retirement system and concluded that the language and structure of the federal legislation⁴⁹ demonstrated a Congressional intent that retired pay accrue directly

appeared prior to their repeal by 1979 La. Acts, No. 709, § 1); LA. R.S. 9:2801-2804 (as they appeared prior to their repeal by 1979 La. Acts, No. 709, § 1).

44. In *DeDon v. DeDon*, 390 So. 2d 937 (La. App. 2d Cir. 1980), *writs granted*, 396 So. 2d 919, *aff'd*, 404 So. 2d 904 (La. 1981), the court held that the husband's Air Force retirement benefits were separate property, because the Federal Supremacy Clause (article VI, clause 2, of the United States Constitution) barred the application of Louisiana community property law. Earlier Louisiana decisions concluding that the husband's military retirement pay was community property were analyzed in light of the United States Supreme Court decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). See *Moon v. Moon*, 345 So. 2d 168 (La. App. 3d Cir. 1977); *Swope v. Mitchell*, 324 So. 2d 461 (La. App. 3d Cir. 1975). The Second Circuit Court of Appeal found that "although *Hisquierdo* only dealt with the Railroad Retirement benefits, we are convinced that military retirement benefits are in the same category and cannot be considered a part of the community." 390 So. 2d 937, 941 (La. App. 2d Cir. 1980).

When the First Circuit Court of Appeal was faced with the issue of classification of the husband's army retirement pay, the court held "that Congress has not 'positively required by direct enactment' that Louisiana's community property laws be preempted as to the nature of military retirements benefits." *Rogers v. Rogers*, 401 So. 2d 406, 409 (La. App. 1st Cir. 1981). In summarizing, Judge Lottinger opined: "We therefore reject the reasoning of the *DeDon* decision as well as the decisions from the Alaska Supreme Court upon which *DeDon* relied. See *Cose v. Cose*, 592 F.2d 1230 (Alaska 1979)." 401 So. 2d at 409.

45. 101 S. Ct. 2728 (1981).

46. 101 S. Ct. at 2736. Although the Court did conclude that it was unnecessary to decide whether federal law prohibits a state from characterizing retired pay as deferred compensation, it discussed the characterization as follows:

Nonetheless, the fact remains that the retired officer faces not only significant restrictions upon his activities, but a real risk of recall. At the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area, lest they disrupt the federal scheme.

101 S. Ct. at 2736 n.16.

47. 101 S. Ct. at 2736.

48. See note 46, *supra*.

49. 10 U.S.C. §§ 3911-3929 (1976).

to the retiree. Thus, since a conflict existed between the terms of the federal retirement statutes and the community property rights asserted by the wife, the issue was whether the application of community property principles to military retired pay threatened "grave harm to 'clear and substantial' federal interests."⁵⁰ The purposes Congress sought to achieve by enacting the military retirement system were described as follows: ". . . to provide for the retired service member, and to meet the personnel management needs of the active military forces."⁵¹ The "grave harm" to federal interests was described in the following language: "Congress has determined that a youthful military is essential to the national defense; it is not for states to *interfere* with that goal by lessening the incentive to retire created by the military retirement system."⁵²

Recognizing that the plight of an ex-spouse of a retired service member is a serious one, the court observed that the decision to afford the ex-spouse more protection is for Congress alone.⁵³ Congressional legislation introduced in the Ninety-sixth Congress to provide for a pro rata distribution of retired pay to a former spouse and to authorize compliance with the terms of a community property settlement died in committee.⁵⁴ Legislation was introduced again in the

50. 101 S. Ct. at 2741.

51. 101 S. Ct. at 2741. As to the first purpose underlying military retirement pay, the Court opined that the community property interest the wife sought, "'promises to diminish that portion of the benefit Congress has said should go to the retired [service member] alone.' See *Hisquierdo*, 439 U.S. at 590." Secondly, the military retirement system was designed "to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure 'youthful and vigorous' military forces." Recognition of the wife's community property interest in her husband's military retired pay has the "potential for disruption of military personnel management. . . ."

Id.

52. *Id.* (emphasis added). In a dissenting opinion, Justice Rehnquist, joined by Justices Brennan and Stewart, concluded that the majority opinion's reliance on *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), was misplaced. 101 S. Ct. at 2742 (Rehnquist, J., dissenting). Under the rule enunciated in *Hisquierdo*, if state family law and a federal statute come into conflict, state law is pre-empted only when Congress has "positively required [it] by direct enactment." 439 U.S. at 581. According to Justice Rehnquist, the majority's failure to analyze vigorously the federal statutes under the *Hisquierdo* rule could only be explained as follows: "[T]he Court cannot, even to its satisfaction, plausibly maintain that Congress has 'positively required by direct enactment' that California's community property law be pre-empted by the provisions governing military retired pay." 101 S. Ct. at 2743 (Rehnquist, J., dissenting).

53. Congress has seen fit to afford "special protection" to the ex-spouse of a civil servant and the ex-spouse of a member of the foreign service. See 5 U.S.C. § 8345(j)(1) (1976) (civil service); 22 U.S.C. § 1076 (1976) (foreign service).

54. H.R. 2817, 96th Cong., 1st Sess. (1979); H.R. 3677, 96th Cong., 1st Sess. (1979); H.R. 6270, 96th Cong., 2d Sess. (1980). See the discussion of these Congressional proposals in *McCarty v. McCarty*, 101 S. Ct. at 2728, 2740 n.25.

Ninety-seventh Congress that would require pro rata division of military retired pay,⁵⁵ but whether this legislative attempt to provide for the ex-spouse of a military member will be successful remains to be seen. Although the Department of Defense did not oppose the legislation introduced in the Ninety-sixth Congress, "it did express its concern over the dissimilar treatment offered service members depending on whether or not they are stationed in community property states."⁵⁶ This particular concern could be solved, of course, by legislation providing in all cases for the pro rata division of military retired pay; yet this approach was described as radical in committee reports on last year's Congressional legislation.⁵⁷

Whether the wife of the retired military member will be entitled to claim reimbursement for one-half of community funds used to acquire separate property⁵⁸ depends upon how the United States Supreme Court characterizes the service member's benefits. If in fact retired pay is considered by the Court as pay for reduced but current services of the military spouse,⁵⁹ rather than deferred compensation, the non-military spouse has no claim for reimbursement. The retired pay is simply earnings accruing after termination of the community, thus separate property. Under Civil Code article 2366, no separate property of the husband was acquired during marriage by the use of community property.

However, if retired pay is considered deferred compensation, representing the product of the effort, skill, or industry of a spouse during the community regime, the other spouse under matrimonial regimes law is entitled to some compensation. In the analogous situation where a spouse's interest in a state statutory retirement plan has been classified as separate property, the other spouse at least has been entitled to claim reimbursement for one-half the community funds used to acquire the interest.⁶⁰ The difficulty military retired pay presents is that the military retirement plan is described by the Court as non-contributory: "neither the service member nor

55. H.R. 3039, 97th Cong., 1st Sess. (1981); S. 888, 97th Cong., 1st Sess. (1981). H.R. 3039 was introduced on April 6, 1981 and sent to the Armed Services Committee; S. 888 was introduced April 7, 1981 and sent to the Finance Committee.

56. "See Hearing on H.R. 2817, H.R. 3677, and H.R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess., 55, 58, 63 (1980) (Statement of Deputy Assistant Secretary Tice)." 101 S. Ct. at 2740 n.26.

57. "See H.R. Rep. No. 96-992, pt. 1, pp. 70-71 (1980); S. Rep. No. 96-913, pp. 66-68 (1980); H.R. Conf. Rep. No. 96-1432, p. 116 (1980)." 101 S. Ct. at 2739 n.24.

58. LA. CIV. CODE art. 2366 (effective January 1, 1980).

59. See discussion in text at notes 46-47, *supra*.

60. See, e.g., cases cited and discussed in text at notes 66-81, *infra*.

the Federal Government makes periodic contributions to any fund . . . ; instead, retired pay is funded by annual appropriations."⁶¹ Yet, the annual appropriations are periodic contributions and Congress' appropriation of the funds can be identified as action of the federal government, the employer. Despite the language utilized by the United States Supreme Court in *McCarty v. McCarty*,⁶² the plan could be characterized as an employer-contributory plan, the appropriations representing additional and deferred compensation. However, language in the majority opinion suggests that the Court does not consider the annual appropriation as a periodic contribution.

The only alternative remedy available, if reimbursement is not, would be an off-setting award recognizing that the pay is deferred compensation, although classified as separate property of the military member. In all probability, the United States Supreme Court would reject such an alternative demand, as they did in *Hisquierdo v. Hisquierdo*.⁶³ Essentially, the off-setting award "would upset the statutory balance and impair [pensioners'] economic security just as surely as would a regular deduction from his benefit check."⁶⁴ In addition to affecting the financial security of the pensioner, such an off-setting award was found in *Hisquierdo* to frustrate federal policy:

By barring lump-sum community property settlements based on mere expectations, the prohibition against anticipation prevents such a obvious frustration of Congressional purpose. It also preserves congressional freedom to amend the Act, and so serves much the same function as the frequently stated understanding that programs of this nature convey no future rights and so may be changed without taking property in violation of the Fifth Amendment.⁶⁵

The implication of such language is that *any* compensation awarded to the non-member spouse, whether in the form of reimbursement or an off-setting award, is prohibited by the Federal Supremacy Clause: otherwise, the "grave harm" to "clear and substantial interests" could be accomplished, indirectly, rather than directly.

While the United States Supreme Court was considering the classification of military retired pay, Louisiana Courts of Appeal were wrestling with classification of state statutory retirement plans. In *Kennedy v. Kennedy*⁶⁶ the Fourth Circuit Court of Appeal

61. *McCarty v. McCarty*, 101 S. Ct. at 2732.

62. 101 S. Ct. at 2732.

63. 439 U.S. 572 (1979).

64. *Id.* at 588.

65. *Id.* at 589-90.

66. 391 So. 2d 1193 (La. App. 4th Cir. 1980).

held that a husband's interest in the Firefighters' Pension and Relief Fund, a state statutory retirement plan,⁶⁷ was separate property. Yet, the Third Circuit Court of Appeal in *Thrash v. Thrash*⁶⁸ held that the wife's interest in the Louisiana State Teachers' Retirement System, also a state statutory plan, was community property to the extent attributable to her employment during the existence of the community.

Relying upon two earlier decisions of the Second Circuit Court of Appeal, *Scott v. Scott*⁶⁹ (State Teachers' Retirement System) and *Roberts v. Roberts*⁷⁰ (Louisiana Employees' Retirement System), the Fourth Circuit Court of Appeal concluded that the legislature intended that the pension rights of the husband in a state statutory retirement plan be separate property because (1) membership in the plan was restricted to a specific type of employment, and (2) rights of members in the plan are "exempted from judicial process, are unassignable, and not subject to any other process. . . ."⁷¹

The Third Circuit Court of Appeal in *Thrash* concluded that "[h]owever appropriate the analogy employed in *Scott v. Scott*, *supra*, we do not follow that line of jurisprudence in the instant suit as recent Supreme Court decisions mandate a different approach in the determination of the community's interest in deferred compensation plans."⁷² The Louisiana Supreme Court cases to which the court referred were *T.L. James & Co., Inc. v. Montgomery*⁷³ and *Sims v.*

67. LA. R.S. 33:2101 (1950 & Supp. 1969 & 1980), as amended by 1980 La. Acts, No. 228, § 1.

68. 387 So. 2d 21 (La. App. 3d Cir. 1980), writ denied, 393 So. 2d 745 (La. 1980).

69. 179 So. 2d 656 (La. App. 2d Cir. 1965).

71. 391 So. 2d at 1197. See LA. R.S. 33:2120 (1950 & Supp. 1969 & 1977), as amended by 1977 La. Acts, No. 640, § 1. However, since payments were made by the husband to the pension plan with community funds, the court held that he was indebted to the community for the contributions made during the community regime. LA. CIV. CODE art. 2408 (repealed January 1, 1980). In addition, the court opined that the non-member spouse is entitled to one-half the value of the increase of the husband's separate property:

The non-member spouse is entitled to reimbursement for contributions made to the fund from the community, plus reimbursement for any increase in value, including interest or contributions that may come from other sources, e.g., the employer. The community's equity in the pension fund should be reimbursable now as an offset in the pending partition.

391 So. 2d at 1198.

72. 387 So. 2d at 24.

73. 332 So. 2d 834 (La. 1976). The court cited at length from *T.L. James & Co. v. Montgomery* and offered an explanation for a footnote appearing in the Louisiana Supreme Court opinion in *T.L. James*, that the decisions holding the teachers' retirement benefits as separate property were inapplicable to the issue presented in the case:

We do not view the language in the above footnote as a comment by the court

Sims.⁷⁴ In particular the third circuit relied on the rationale of *Sims v. Sims* which held that the husband's rights in a federal statutory retirement plan were community property to the extent attributable to his employment during marriage. According to the majority of the third circuit, by concluding that the husband's federal statutory plan was community property, "the Supreme Court rejected the reasoning which formed the basis of the *Scott* decision."⁷⁵ The Louisiana Supreme Court in the *Sims* case, relying on *Moon v. Moon*⁷⁶ and *Swope v. Mitchell*,⁷⁷ involving the husband's rights in a military pension plan, stated that the exemption provisions in federal statutory plans do not preclude the classification of federal retirement rights as community property. Therefore, the third circuit, following this reasoning, concluded that it is likewise true that a state exemption statute, i.e., one forbidding the execution-sale and limiting the assignability of retirement plan proceeds, such as Louisiana Revised Statutes 17:573, *supra*, does not preclude the classification of state retirement rights as community property.⁷⁸ To the extent that the decision in *Thrash* was based on *Moon*, *Swope* and *Sims*, however, it arguably has been overruled by the United States Supreme Court decision in *McCarty v. McCarty*.⁷⁹ Yet, in addition to the rationale of *Sims*, the third circuit correctly observed that the exemption provisions which often appear in state and federal statutory plans "are not dispositive of ownership as they serve no classificatory function."⁸⁰ Such a conclusion is reminiscent of the dissent by Judge Marvin in *Roberts v. Roberts*,⁸¹ which is cited in *Thrash*.

The majority of state court decisions, with only one exception, reach the same result as the United States Supreme Court did concerning the classification of a spouse's interest in a statutory plan. Thus, a spouse may reason that government employment has bene-

on the correctness of the *Scott* line of cases. Nor do we find said footnote as controlling as (1) there was no question before the court in *Montgomery* concerning teacher retirement benefits; (2) the parenthetical comment within the footnote has dubious meaning as there is no "special legislation" which specifically provides that "benefits under the teacher's retirement system are the separate property of the teacher-spouse"; and (3) finally, any doubt that the language of said footnote might have cast on our decision today has been dispelled by the *Sims* decision.

387 So. 2d at 25.

74. 358 So. 2d 919 (La. 1978).

75. *Thrash v. Thrash*, 387 So. 2d 21, 25 (La. App. 3d Cir. 1980).

76. 345 So. 2d 168 (La. App. 3d Cir. 1977).

77. 324 So. 2d 461 (La. App. 3d Cir. 1975).

78. 387 So. 2d at 25.

79. See text at notes 45-52, *supra*.

80. 387 So. 2d at 25.

81. 325 So. 2d at 680-81, cited in *Thrash v. Thrash*, 387 So. 2d at 21 n.2.

fits and advantages over private industry⁸² not ordinarily extolled. A spouse employed by the state or federal government is accumulating rights in a retirement plan, an asset of significant value, that will be separate property should the marriage terminate. Furthermore, if the federal government is the employer and the retirement system is created by statute, the non-employee spouse cannot claim compensation through off-setting awards, or reimbursement. One may ponder whether there is a justification for the difference in treatment of the pension plans of private industry as compared to the statutory retirement plans of the government.

Credit Purchases of Immovable Property During the Community Regime

Purchases of immovable property by the wife during the existence of a community regime were presumed to be community property under Louisiana Civil Code articles 2402⁸³ and 2405.⁸⁴

82. *T.L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1976), is an example. Furthermore, some cases have held that a private plan regulated by ERISA, a federal statute, are not governed by the same rules on classification of a spouse's interest, as retirement systems created by federal statute. See, e.g., *Operating Eng's Pension Trust v. Lionberger*, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (1979), *cert. denied*, 446 U.S. 951 (1980); *Carpenters Pension Trust Fund for N. Cal. v. Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980); *Retirement Fund Trust of the Plumbing Heating & Piping Ind. of S. Cal. v. Johns*, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *cert. denied*, 444 U.S. 1028 (1980).

But see *Kuchta v. Kuchta* 50 U.S.L.W. 2165 (Mo. Sup. Ct., Aug. 8, 1981). A private retirement plan, which provides pension benefits, is subject to divestiture on contingencies; therefore, it is not marital property subject to equitable division. Furthermore, the same concerns which prompted the United States Supreme Court in *McCarty v. McCarty* to hold that a federal statutory plan is the separate property of the member spouse, are valid in the property of the private market place. Retirement plans in the private market also fulfill the same purposes, enumerated in the *McCarty* case, as a military retirement plan.

83. LA. CIV. CODE art. 2402 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1):

This partnership or community consists of the profits* of all of the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

* Note error in translation of French text; "profits" should be "fruits."

84. LA. CIV. CODE art. 2405 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1):

Under those two articles as interpreted by the jurisprudence, an acquisition of property by either spouse during the existence of the community of acquets and gains was presumed to be community property. However, the burden of proof imposed upon the wife to rebut the presumption that the property was community was significantly different from that imposed upon the husband.⁸⁵ The wife was required to prove that (1) the property was purchased with her separate funds, (2) under her separate control and administration, (3) for the benefit of her separate estate, and (4) if a credit purchase, that she had sufficient separate funds at the time of the purchase so as it would be reasonable to expect her to meet the deferred payments.⁸⁶ If the husband concurred in the act of acquisition executed by the wife in which she declared that she was purchasing with her separate property for the benefit of her separate estate, the husband was thereafter estopped to deny that the property was in fact separate property.⁸⁷

At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

85. The husband was required to insert in the act of acquisition by which immovable property was purchased ("or in any other similar way," LA. CIV. CODE art. 2402 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1)), a "double declaration to the effect that the property purchased was paid for with separate funds for the benefit of his separate estate." See, e.g., *Slaton v. King*, 214 La. 89, 36 So. 2d 648 (1948); *Phillips v. Nereux*, 357 So. 2d 813 (La. App. 1st Cir. 1978), and cases cited therein. Absent the "double declaration" by the husband in the act of acquisition, the property was conclusively presumed to be community property; thus, the failure of the husband to include "the declaration" became a rule of classification of property, rather than a rule of evidence. See *Samuels, Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality*, 39 LA. L. REV. 347, 398-400 (1978). If the husband did insert the "double declaration" in the act of sale, he was not relieved of the burden of proving that the property was in fact acquired with separate funds for the benefit of his separate estate. The "double declaration" requirement imposed upon the husband has been legislatively overruled by Civil Code article 2340 (effective January 1, 1980). See LA. CIV. CODE art. 2340, comment (b).

86. See, e.g., *Betz v. Riviere*, 211 La. 43, 29 So. 2d 465 (1947); *Minden Chamber of Commerce v. Goodman*, 243 So. 2d 843 (La. App. 2d Cir. 1971); *Succession of Winsey*, 170 So. 2d 732 (La. App. 1st Cir. 1964).

87. *McElwee v. McElwee*, 255 So. 2d 883, 887-88 (La. App. 2d Cir. 1971), writ refused, 216 La. 861, 257 So. 2d 434 (1972):

The husband is estopped to deny the paraphernal nature of the property where the deed of acquisition recites the property is purchased by the wife for her separate estate, with separate funds under her own administration and control, and the husband executes the instrument acknowledging these facts to be true. *Succession of Bar*, 219 So. 2d 817 (La. App. 2d Cir. 1969).

See also A. YIANNPOULOS, PROPERTY § 130 in 2 LOUISIANA CIVIL LAW TREATISE 344-345 & n.177 (2d ed. 1980).

Last year the Fourth Circuit Court of Appeal concluded that if a wife bought a \$60,000 house with only \$28,500 of her separate funds, intending to pay the credit balance with community funds and monetary inflation made the house worth \$150,000, then the fair treatment "is to hold it owned 28,500/60,000 (or 47.5%) by the wife's separate estate and 31,500/60,000 (or 52.5%) by the community."⁸⁸ Although the husband had acknowledged in the act of purchase that the house was being bought with the wife's separate funds and was her separate property, Judge Redmann concluded he was not thereafter estopped to deny that the credit portion was in fact paid for with separate funds. According to Judge Redmann, estoppel by deed "applies only to existent facts that are recited in the deed, and not to future factual expectations or to matters of legal interpretation. (Indeed, one may question whether a spouse ever is estopped by a recital of separateness—a conclusion at least partly of law rather than purely of fact.)"⁸⁹ The reasons cited for failing to apply the presumption that the property acquired was community was "severe inflation."⁹⁰ Since the husband was estopped to deny that the down payment had been made with the wife's separate property (which she could prove), it was as if the wife bought an undivided interest in the piece of immovable property for her separate estate, with the other undivided interest being purchased for the community.⁹¹

88. *Curtis v. Curtis*, 388 So. 2d 816, 817 (La. App. 4th Cir.), writ granted, 395 So. 2d 339 (1980), rev'd, 403 So. 2d 56 (La. 1981).

89. 388 So. 2d at 818.

90. Notwithstanding that *Jordy v. Muir*, 1898, 51 La. Ann. 55, 25 So. 550, lend superficial support to a conclusion that the house in our case is treatable as 100% community, *Jordy* did not face the problem of severe inflation: there a house bought for \$2500 sold for \$2300 net. . . . *Jordy* is thus but an example of this opinion's first premise: it makes no economic difference which estate owns the property subject to a debt owed to the other, if the property's value is constant. *Jordy* does not answer our question. We have had to provide our own answer, and we have done so as fairly as we can.

Id. at 819.

91. Finally, we note that undivided interests can be purchased by a community or spouse: a husband who was "head and master" could have expressly purchased a 47.5% undivided interest in a house for his separate estate, with the other 52.5% being purchased for the community. The wife should not be denied the same power to buy an undivided interest when the husband by signing her act of purchase agreed that she was (at least!) to that extent purchasing for her separate estate, and agreed that the credit portion of the price was to be paid with the rentals which by law belonged to the community. Certainly it was the wife's expressed intent to make an investment for her separate estate, and it was only her lack of funds that prevented her purchasing the entire property for her separate estate.

Id.

The Louisiana Supreme Court, on writ of certiorari, reversed the court of appeal.⁹² The supreme court held that the property purchased by the wife was her separate property and that the declarations in the act of sale "served to reserve the fruits of her separate property for her separate use."⁹³ Therefore, the wife was not obligated to reimburse the community for the use of the rentals to pay the credit portion of the purchase price. The rationale that the Louisiana Supreme Court utilized to reach the foregoing conclusions is important not only for purposes of interpretation of the old matrimonial regimes law but also for purposes of the interpretation of the matrimonial regimes law effective January 1, 1980.

First, the Louisiana Supreme Court opined, "while other community property states may categorize property paid for in part with separate funds and in part with community funds as mixed, Louisiana does not do so."⁹⁴ According to the supreme court, under Louisiana law property is either community or separate. Such a conclusion is consistent with Louisiana Civil Code article 2335 which declares that "[p]roperty of married persons is either community or separate." However, despite Civil Code article 2335, the jurisprudence has recognized that certain property may be owned proportionately by the community and the separate estate of a spouse—such as interests in retirement plans,⁹⁵ contingent fee contracts,⁹⁶ and personal injury recoveries.⁹⁷ Limited to its facts, however, the supreme court decided that immovable property purchased on credit will not be owned proportionately by the separate estate of a spouse and the community as a "mixed acquisition."⁹⁸

92. 403 So. 2d 56 (La. 1981).

93. *Id.* at 60.

94. *Id.* at 57-58.

95. *See, e.g.*, cases cited in note 82, *supra*.

96. *Du   v. Du  *, 342 So. 2d 161 (La. 1977). The narrow issue presented was whether the husband was obligated to respond to interrogatories propounded by his ex-wife about his contingent fee contracts with clients executed during the existence of the legal regime. *See also* Note, *Classification of Incorporeal Movables*, 42 LA. L. REV. 744.

97. *See, e.g.*, *West v. Ortego*, 325 So. 2d 242 (La. 1975); *Chambers v. Chambers*, 259 La. 246, 249 So. 2d 896 (1971). As to personal injury recoveries, the matrimonial regimes legislation specifically recognized that the separate estate of a spouse and "the community" may have an interest in damages received for a spouse's personal injury (*i.e.*, for lost earnings), thus constituting a legislative exception to Civil Code article 2335.

See LA. CIV. CODE art. 2344 (effective January 1, 1980), the text of which is reproduced at note 11, *supra*.

98. *See* the description of problems for other community property states which recognize proportionate ownership of immovable property in Cross, *Community Property: A Comparison of the System in Washington and Louisiana*, 39 LA. L. REV. 479, 485 (1979); Huie, *Separate Ownership of Specific Property versus Restitution from*

Secondly, since the property was purchased by the wife during the existence of a community regime, it was presumed to be community property under Louisiana Civil Code articles 2402 and 2405. The presumption is rebuttable, according to the Louisiana Supreme Court, if the wife proves that she used separate funds for the purchase and that the funds were administered by her alone and were available for investment.⁹⁹ However, the prior jurisprudential requirement that the wife purchasing on credit prove "that the cash portion of the purchase price bore such a relation to the total price that the property afforded sufficient security for the credit portion, and that she had sufficient separate revenues to be reasonably certain of being able to meet the deferred payments"¹⁰⁰ is no longer justified. In speaking for the majority Justice Dixon opined:

We believe that a married woman is entitled to purchase property on credit as an investment, and to avail herself of the same credit devices her husband can use. We do not believe that she should have to prove that she can use credit more wisely than he. If she later used community funds to pay her separate debt she is obligated to reimburse the community for that amount.¹⁰¹

Community Property in Louisiana, 26 TUL. L. REV. 427 (1952), cited in footnote 2 of the Louisiana Supreme Court decision in *Curtis v. Curtis*, 403 So. 2d 56 (La. 1981).

The California Supreme Court recently resolved a conflict in three California Courts of Appeal decisions concerning the characterization of a residence (immovable property) purchased during the parties' marriage with both separate and community funds. In *Lucas v. Lucas*, 166 Cal. Rptr. 853, 614 P.2d 285 (1980), the California Supreme Court approved of the approach utilized in *In re Trantafello*, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979), which held that a residence purchased during marriage with separate and community funds was entirely community property in the absence of any evidence of an agreement or understanding between the parties to the contrary. According to the California Supreme Court, the act of taking title in joint ownership is inconsistent with the intention to preserve a separate property interest. The Supreme Court rejected a scheme for pro-rata apportionment of the equity appreciation between separate and community contributions to the purchase price, a result reached by one California court of appeal in *In re Aufmuth*, 89 Cal. App. 3d 466, 152 Cal. Rpt. 668 (1979).

99. See, e.g., *Succession of Franek*, 224 La. 747, 70 So. 2d 670 (1953); *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933); *Succession of Burke*, 107 La. 82, 31 So. 391 (1902); *Minden Chamber of Commerce v. Goodman*, 243 So. 2d 843 (La. App. 2d Cir. 1971); *Succession of Winsey*, 170 So. 2d 732 (La. App. 1st Cir. 1964).

100. 403 So. 2d 56, 58 (La. 1981).

101. *Id.* at 58-59.

It may have been logical for courts then to assume that the wife who received a particular donation, or inheritance, and used it to purchase property on credit terms would in fact have to use community funds for subsequent payments, in the absence of a continuing source of income. Today, however, with an ever increasing number of women entering the work force, such restrictions are no longer supportable. Just as our legislature has amended the matrimonial regimes section

Therefore, the majority of the supreme court in *Curtis v. Curtis* imposed a triple burden of proof upon the wife to rebut the presumption that the property she acquired was community. She had to prove that she used separate funds for the purchase, which she did successfully. She had to prove that the funds were administered by her alone, which she did in the following manner: (1) by proof in interrogatories that she had in fact sold two pieces of separate property and used that money for the downpayment, and (2) by the declaration of her intent to administer her separate funds alone in the act of acquisition in substantial compliance with Louisiana Civil Code article 2386.¹⁰² She had to prove she had sufficient funds available for investment, proof of this fact presumably being made by the wife's response to interrogatories concerning other pieces of separate property that she owned and administered. The judicially imposed "triple burden" of proof required of the wife to rebut the presumption that property acquired is community has implications for the interpretation of Louisiana Civil Code article 2340.¹⁰³

Under article 2340 property possessed by either spouse during the existence of the legal regime is presumed community, "but either spouse may prove that they [things] are separate property." The implication of the quoted language is that "the double declaration" requirement imposed upon the husband by prior jurisprudence¹⁰⁴ has been legislatively overruled.¹⁰⁵ The burden of proof

of our Civil Code to reflect modern economic and social realities, so are we impelled to eliminate these restrictions and to recognize that rules which produce a just result under certain circumstances may not do so when conditions change.

102. See text at notes 120-124, *infra*. LA. CIV. CODE. art. 2386 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1):

The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

103. LA. CIV. CODE art. 2340 (effective January 1, 1980):

Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.

104. See cases cited in note 85, *supra*.

105. LA. CIV. CODE art. 2340, comment (b) (effective January 1, 1980): "This provision suppresses the requirement of a double declaration established by Louisiana jurisprudence."

which a spouse must bear to rebut the presumption of article 2340 is not directly addressed by the legislation. Should the spouse be required to prove the elements required of the husband when he had the "double declaration" in his act of acquisition or "the triple burden" imposed under *Curtis v. Curtis*? The "triple burden of proof" differs from that required of the husband who included the "double declaration" in only one respect—the wife was required to prove the separate funds were administered solely by her. In light of the statutory changes in Civil Code article 2339,¹⁰⁶ which provides that the natural and civil fruits of separate property can be reserved as separate, the second element of proof of the "triple burden" should no longer be imposed. At the time of the facts in *Curtis v. Curtis*, under Louisiana Civil Code article 2386 the wife who wished to reserve the income from her separate property as separate had to declare that she was doing so and further declare her intention to administer the property separately and alone. The latter declaration was necessary to overcome the presumption that the husband administered her separate property under Louisiana Civil Code article 2385.¹⁰⁷ Requiring the wife to prove her separate administration was a partial assurance that the wife had a source of sufficient separate funds to pay the purchase price; for otherwise, the income of her separate property was community. Since neither husband nor wife need declare their intention to administer separate property alone under article 2339, proof of sole administration of separate property should not be required to rebut the presumption of Civil Code article 2340. Properly interpreted, Civil Code article 2340 requires that a spouse prove that he used his separate funds to acquire property for the benefit of his separate estate. Proof of the two elements above should be sufficient to rebut the presumption that the property acquired is community.

The effect of the declaration by the wife in the act of purchase that she was acquiring with separate funds for the benefit of her separate estate, acknowledged by the husband, was to classify the

106. LA. CIV. CODE art. 2339 (effective January 1, 1980, as amended by 1980 La. Acts, No. 565, § 2):

The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse *may reserve them as his separate property* by a declaration made in an authentic act or in an act under private signature duly acknowledged. . . .

(Emphasis added).

107. LA. CIV. CODE art. 2385 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1): "The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband."

property as separate property. The Louisiana Supreme Court observed, "[o]ur jurisprudence has long held that a husband who has been a party to an act of purchase in which such declarations are made cannot afterwards be heard to contradict it."¹⁰⁸ According to the supreme court, the principle of "estoppel by deed" recognized by Louisiana jurisprudence applies to property purchased by the wife "even if it was bought on credit."¹⁰⁹ The supreme court departed from the court of appeal's interpretation that "estoppel by deed" only applied to presently existing facts, not future expectations. The Louisiana Supreme Court observed that the legislature had codified this principle in Louisiana Civil Code article 2342.¹¹⁰ Thus, under *Curtis v. Curtis* the first sentence of article 2342 will apply to credit sales, as well as cash sales. A spouse under the provisions of article 2342 may not controvert a declaration that property is acquired with separate funds for the benefit of the other spouse's separate estate if he concurred in the act. If there is such a declaration, concurred in by the other spouse, the property is separate property as between the spouses—a rule of classification.

Related to the character of the funds used to pay the credit portion is the issue of whether the subsequent use of community funds changes the character of an asset declared to be separate at acquisition. According to the Louisiana Supreme Court, property declared to be separate at acquisition cannot be converted to community property by the use of community funds to make subsequent credit payments. Only when community and separate funds "are mingled in the *initial acquisition* may the property be regarded as community."¹¹¹ During the discussion of the issue of "shifting" classification of property the following statement was made: "[use of community funds to make subsequent credit payments] would not convert the property or any portion of it to community property."¹¹² However, this statement was qualified by the following footnote:

108. 403 So. 2d 56, 59 (La. 1981). The court cited a authority for this proposition *Betz v. Riviere*, 211 La. 43, 29 So. 2d 465 (1947); *Rousseau v. Rousseau*, 209 La. 428, 24 So. 2d 676 (1946); *Pfister v. Casso*, 161 La. 940, 109 So. 770 (1926); *Maguire v. Maguire*, 40 La. Ann. 579, 4 So. 492 (1888); *Kerwin v. Hibernia Insurance Co.*, 35 La. Ann. 33 (1883).

109. *Id.* at 59.

110. *Id.* at 59.

Our legislature has seen fit to recognize the wisdom of this judicial principle by codifying it as new C.C. 2342 (effective January 1, 1980): "A declaration in an act of acquisition that things are acquired with separate funds as separate property of a spouse may be controverted by the other spouse *unless he concurred in the act. . . .*"

111. *Id.* at 59 (emphasis added).

112. *Id.* at 59.

"Under new Civil Code articles 2338 and 2341, which do not apply to this case, property purchased with both separate and community funds would appear to be community property unless the amount of community funds used is inconsequential in comparison with the amount of separate funds used."¹¹³ The footnote does not indicate whether the transaction contemplated involved commingling of funds at the time of the *initial* acquisition. Therefore, the implication may be that under the new matrimonial regimes legislation a different result may obtain—that is, that separate property may "shift" in classification from separate to community. If a property's character established at the moment of acquisition¹¹⁴ may be converted by the use of community funds to pay any credit balance,¹¹⁵ prior rules regarding the classification of insurance contracts,¹¹⁶ pensions and profit-sharing plans, and credit purchases of immovable property¹¹⁷ have been changed.¹¹⁸ Presumably, such a result was not the intention of the legislature. The only evidence available of the legislature's intention is in a comment to Louisiana Civil Code article 2341: "The value of the community things *at the time of acquisition* should be used for determining whether it is 'inconsequential' in comparison with the value of the separate things used."¹¹⁹ The

113. *Id.* at 59 n.4.

114. LA. CIV. CODE art. 2338 (effective January 1, 1980):

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

115. LA. CIV. CODE art. 2341 (effective January 1, 1980, as amended by La. Acts 1981, No. 921, § 1):

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.

116. *See, e.g.,* Connell v. Connell, 331 So. 2d 4 (La. 1976).

117. *See* cases cited in note 108, *supra*.

118. *See* Note, *Classification of Incorporeal Movables*, 42 LA. L. REV. 744.

119. LA. CIV. CODE art. 2341, comment (b), (effective January 1, 1980, as amended by 1981 La. Acts, No. 921, § 1) (emphasis added).

language "at the time of acquisition" suggests the same interpretation as that of Chief Justice Dixon in the *Curtis* case; that is, only when community and separate funds are commingled in the *initial* act of acquisition may the property be regarded as community.

The Fourth Circuit Court of Appeal concluded that community funds were used to pay the credit portion of the purchase price, because payments had been made with the rental income from the property.¹²⁰ Since the wife had failed to record the notarial declaration reserving "all" of the fruits of her separate property as separate,¹²¹ the rental income was community property. In reversing the decision of the court of appeal, the Louisiana Supreme Court held that "the declarations made and signed by Mr. and Mrs. Curtis are in substantial compliance with the requirements of Civil Code article 2386 to reserve the fruits (rentals) of her separate property to her separate estate."¹²² It was unnecessary for the wife to have filed a "separate" authentic act reserving the income as separate, since Civil Code article 2386 "does not specify that the declarations must be made in a separate document."¹²³ According to the supreme

120. According to the court,

[I]t was always the intention of both wife and husband that funds the law declares community funds (rental income from the house, because the wife has not recorded the notarial declaration of reservation to her separate estate of "all" of the fruits of her separate property. . . .) would pay the balance of the price, by monthly payments during the next 15 years.

388 So. 2d at 817-18.

121. LA. CIV. CODE art. 2386 (as it appeared prior to its repeal by 1979 La. Acts, No. 709, § 1). The word "all" of the fruits of her separate property was emphasized by the court of appeal in footnote one of the opinion in *Curtis*, 388 So. 2d 816, 817-18. This purposeful emphasis is of some significance in light of the Louisiana Supreme Court's decision that the declaration in the wife's acquisition was sufficient to categorize the rental income produced as separate property under Civil Code article 2386. See text at notes 122-23, *infra*.

The possible unconstitutionality of article 2386 was alluded to in the court of appeal decision, 388 So. 2d 816, 817-818 & n.1 (La. App. 4th Cir. 1980), and in the dissenting opinion by Justice Calogero in the supreme court decision, 403 So. 2d at 61 (Calogero, J., dissenting).

122. 403 So. 2d at 60. Paraphrasing the declarations made by the husband in the offer to purchase and the act of sale, the Louisiana Supreme Court summarized as follows:

Mr. Curtis intervened in both the purchase offer and the act of sale, declaring that the property was his wife's separate and paraphernal property, purchased with separate and paraphernal funds under her administration and control and that the community which existed between them had no interest whatsoever in the property and that all payments and installments due on the property would be paid by his wife with separate funds under her separate administration and control.

Id. at 57.

123. *Id.* at 60.

court, "[t]he joint declaration by the parties that all credit payments on the property will be paid with Mrs. Curtis' separate funds, under her administration and control, is sufficient to protect *all the rents from which the credit portion was to be paid* from falling into the 'conjugal partnership.'"¹²⁴ In a dissenting opinion, Justice Calogero opined that the wife had failed to comply with the provisions of article 2386 for the following reasons: (1) she had made no declaration, only the husband had (she simply signed the act of sale) and (2) the declaration did not state specifically that the fruits of the property were being reserved or that she intended to administer the piece of property separately and alone.

Louisiana Civil Code article 2339 requires that a spouse who desires to reserve the natural and civil fruits and other income from separate property as separate execute an authentic act or act under private signature. Reserving the administration of a spouse's separate property is unnecessary under article 2339. With this one exception, if article 2339 otherwise is interpreted as its predecessor, article 2386, was in *Curtis*, several questions are raised. If the declaration such as that in *Curtis* is contained in an act of acquisition of immovable property, does it have general application, classifying all income from separate property as separate? To demonstrate, if income from other separate property had been used to pay the credit portion, would the payments have been considered separate property? Likewise, had the rental income been used for a purpose other than the payment of the credit portion of the price would it still have been classified as separate property? From a careful reading of the majority and dissenting opinions, the separate characterization of the income produced from the property was dependent upon its being rental income from the specific piece of immovable property *and* actually having been used for the purpose of paying the balance due on the purchase price. If so, it could be incumbent upon the spouse relying upon such a declaration to prove the property produced rental income and that these rents were the identical funds used to pay the credit portion of the price. Should the spouse fail to prove both elements, the payments would be presumed to have been made with community funds, thus imposing an obligation on the spouse whose separate property was benefitted to reimburse the other spouse.¹²⁵

124. *Id.* at 60 (emphasis added).

125. LA. CIV. CODE art. 2366 (effective January 1, 1980).